Selwyn's *Nisi Prius*, 1129; *Walter* v. *Selfe*, 4 De G. & Sm.

Feb. 7.—Lord Romilly, M.R.—The plaintiff, in this case, is the occupier and owner of a house in Walsall, in Staffordshire, and complains that the defendants have recently erected an iron factory adjoining his grounds, the smoke, noise, and effluvia proceeding from which, occasion a nuisance which he applies to the Court to abate. The defence, in substance, is twofold; first, one of law, and secondly, one of fact. The defendants say that smoke alone does not entitle a person to come here for an injunction; that a disagreeable smell alone does not entitle a plaintiff to ask for an injunction; that noise alone does not entitle a plaintiff to ask for an injunction. Secondly, they insist that the evidence shows that there are no noxious gases emitted from the defendants' works, and likewise the evidence on the part of the plaintiff is grossly exaggerated, and that, having regard to the smoke and noise which always prevails in and about Walsall, the defendants' factory has only added an inappreciable addition to what already existed. With respect to the question of law, I consider it to be established by numerous decisions that smoke, unaccompanied with noise or with noxious vapours—that noise alone, that offensive odours alone—although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighbouring property, and that if they do so, substantial damages may be recovered at law, and that this Court, if applied to, will restrain the continuance of the nuisance by injunction in all cases where substantial damages could be recovered at law. *Elliotson* v. *Feltham* and *Soltau* v. *De Held* are instances relating to noise alone. In the former, damages were reserved in an action at law; and, in the second, an injunction was granted on account of sound alone. What constitutes a nuisance is defined by L. J. Knight Bruce in *Walter* v. *Selfe*, 4 De G. & Sm. 322. But until that time has elapsed the owner of the adjoining or neighbouring tenement, whether he has, or has not, previously occupied it, or is the owner—whether he comes to the nuisance or the nuisance comes to him—retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of the fumes by the deposit of deleterious substances, or by the flow of water. And the doctrine suggested in *Hole* v. *Barlow*, that the spot from whence nuisance proceeds was a fit, proper, and convenient spot for carrying on the business or works which produced the nuisance, is no excuse for the act, and cannot be made available as a defence either at law or in equity. This same definition is adopted in *Soltau* v. *De Held* by V. C. Kindersley, and is, I apprehend, strictly correct, and it agreed with the principle of the cases referred to at common law, and approved of in the case of *Tipping* v. *St. Helen's Company*, which settled the law as regards another part of this case, to which I shall presently have occasion, when citing *Hole* v *Barker*, to refer. The law on this subject is, I apprehend, the same, whether it be enforced by action at law or by bill in equity. In any case, where a plaintiff would obtain substantial damages at law, he is entitled to an injunction to restrain the nuisance in this Court. There is, I apprehend, no distinction between any of the cases, whether it be smoke, smell, noise, vapours, or water, or any gas or fluid. The owner of one tenement cannot cause or permit to pass over, or flow into his neighbour's tenement, any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property. It is true that, by lapse of time, if the owner of the adjoining tenement, which, in cases of light or water, is usually called the servient tenement, has not resisted or complained for a period of twenty years, then the owner of the dominant tenement has acquired the right of discharging the gases or fluid, or sending the smoke or noise from his tenement over the tenement of his neighbour.

The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence? This is what is established in the *St. Helen's Company* v. *Tipping*, and that is the question which is to be tried in the present case. [His Lordship then proceeded to comment upon the evidence, and proceeded.] I am of opinion the smoke and noise proceeding from the works of the defendants constitute a substantial nuisance, and that the plaintiff is entitled to the assistance of this Court to have it abated. I don't see sufficient doubt about the case to induce me to direct an issue. I shall make such an order as the Vice-Chancellor made in *Walter* v. *Selfe*, that is, an injunction to restrain the defendants, their servants, and workmen, and agents, from allowing smoke and effluvia to issue from their said factory, so as to occasion nuisance, disturbance, or annoyance to the plaintiff, owner, or occupier of the tenement, in the bill mentioned, called Mount Pleasant, and a similar injunction to restrain the defendants, their servants, workmen, and agents, from working or causing to be made noises in the factory, so as to occasion nuisance, disturbance, and annoyance to the plaintiff, or the owner or occupier of the said messuage, as the bill mentioned. I cannot make it more precise—it is always a question of degree; and if the defendants can continue to carry on their works in such a manner as to avoid any substantial issue of smoke or noise, they will not violate the injunction; whether they do or do not, may have to be tried in another proceeding. The costs must follow the event up to and including the hearing, reserve liberty to apply.

Solicitors for the plaintiff, *Walton & Walton.*
Solicitor for the defendant, *Duignan.*

UNITED STATES REPORTS.

NEW YORK SUPREME COURT.

Leonard P. J., Clerke and Ingraham, J. J.

GILLOTT v. ESTERBROOK, ET AL.

Trade Marks—Injunction.

Where one manufacturer exclusively has for a long time used a certain number to designate his goods, and by which they have become extensively known, that number is his trade mark: and an injunction will be granted against its use in like manner by other manufacturers of like articles

Appeal by Richard Esterbrook, et al., Respondents, from decree of special term continuing injunction.

The plaintiff, Joseph Gillott, now appellee, is a manufacturer of steel pens in Birmingham, England, and has been such for many years past. His pens had obtained a great notoriety throughout this country, as well as Europe.